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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 286 55988 Office: CALIFORNIA SERVICE CENTER Date: FEB 11 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a software development firm for the oil and gas industry. It seeks to employ the beneficiary permanently in the United States as its Vice-President of Development. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in block 14 of the Form ETA 750 as of the priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). In this instance, the petition's priority date is April 4, 2001.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), provides:

> (A) In general. - Visas shall be made available … to the following classes of aliens who are not described in paragraph (2):
>
> (i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
>
> (ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

In a request of February 5, 2002 (Form I-797), the director required evidence that the beneficiary held a United States baccalaureate degree or the foreign equivalent of a baccalaureate degree with copies of the transcripts and the degree.

Former counsel responded with several employment verification letters, the beneficiary's resume, and an "Evaluation Report" based on them from the Foundation for International Services, Inc.

(FIS). The submissions included no degree. FIS, however, judged that 16½ years of progressively more responsible employment (rated at 3 years of experience for one of university-level credit) conferred an educational background the equivalent of an individual with a bachelor's degree in business administration with an emphasis in management information systems from an accredited college or university in the United States.

The director determined that the beneficiary held no bachelor's degree or a foreign equivalent and denied the petition. The director noted that FIS relied on 8 C.F.R. 214.2(h)(4)(iii)(D)(5), a non-immigrant visa regulation, and pointed out that equivalency of experience with education does not apply to immigrant visa petitions under section 203(b)(3)(a)(i) and (ii) of the Act, *supra*.

The new counsel on appeal contends:

> …. This educational requirement can be satisfied by: (1) a U.S. or foreign degree that is recognized as a bachelor's degree; (2) work experience that equates to a bachelor's degree; or (3) a combination of work experience and education that is the equivalent of a bachelor's degree.

Counsel supports the appeal with several adjudications and texts (exhibit 1) and meeting minutes including hypothetical instances (exhibit 2). None incorporates a policy memorandum or has a published citation. While 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. 103.9 (a).

Counsel, also, presents a "Professional Experience Education Equivalency Evaluation" for the beneficiary from Educated Choices, LLC (Exhibit 3). It concludes that the beneficiary has achieved professional recognition as having attained the equivalent of a U.S. bachelor degree with a major in management information systems equal to that of an individual who has a U.S. bachelor's degree in that major. An opinion letter dated May 22, 2002 is in accord (Exhibit 4). The brief on appeal appends several experience letters (Exhibit 5).

The Form ETA 750 in block 14 does not state that any lesser level of education or that another major field of study will satisfy it. To the contrary, it specified that the position of Vice-President of Development required a bachelor's degree or equivalent with a major field of study in business administration, as well as four

(4) years of experience in the job offered or the related occupation of director or manager of development.

Counsel's brief on appeal admits, "The petitioner's [Form ETA 750] is drafted to facilitate classification of an individual as either a "skilled worker" or a "professional."" For an immigrant petition for a professional, the term "equivalent" unequivocally means "a foreign equivalent degree." *See* 8 C.F.R. 204.5(l)(3)(ii)(C). The Form ETA 750 would be viable for a professional classification only if it did establish the baccalaureate degree or the foreign equivalent degree as the minimum requirement. It means the same for either a "skilled worker" or "professional." The director properly refused to apply non-immigrant visa regulations found at 8 C.F.R. 214.2(h)(4)(iii)(D)(5).

To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is, in fact, qualified for the certified job. The Service will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service may not ignore a term of the labor certification, nor may it impose additional requirements. *See* Matter of Silver Dragon Chinese Restaurant, 19 I & N Dec. 401, 406 (Comm. 1986). *See also,* Mandany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir 1981).

The contention that the instant petition was one for a skilled worker, not a professional, is immaterial. The skilled worker must, nonetheless, have the education specified in block 14 of the Form ETA 750.

The Form ETA 750 is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner has not established that the beneficiary had earned a baccalaureate degree or the foreign equivalent on the priority date. The petitioner, therefore, has not overcome this portion of the director's decision.

In passing, the petitioner made Notice of Entry of Appearance as

Attorney or Representative (G-28) and filed the visa petition on August 22, 2001. The petitioner merged in a surviving corporation on September 10, 2001. The new corporation authorized appeal and executed the G-28 for new counsel.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.